FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-365

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

vs.

LASALLE NATIONAL BANK, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

QUESTION PRESENTED.

Whether the Internal Revenue Service properly may issue a summons solely in aid of a criminal investigation.

STATEMENT.

On August 15, 1975, two summonses from the Internal Revenue Service were served upon the Respondents. The summonses were directed to the LaSalle National Bank as trustee under two Illinois land trusts,[1] and required the Respondents to appear

1. An Illinois land trust is a contract by which a trustee is vested with both legal and equitable title to real property and the interest of the beneficiary is considered personal property. Under this trust

(Footnote continued on next page.)

and give testimony as well as produce records with respect to these land trusts. (A. 9-16)

The Respondents appeared in response to the summonses, but, on advice of counsel, did not produce the land trust records or give testimony.

On November 19, 1975, the Petitioners herein filed a petition seeking judicial enforcement of the summonses. On that date the District Court for the Northern District of Illinois entered an *Ex Parte* Order requiring the Respondents to appear on December 5, 1975, and to show cause why they should not be compelled to obey the two Internal Revenue Service summonses.

Pursuant to the Order, the Respondents appeared on December 5, 1975, at a hearing held by the district court to determine the enforceability of the two Internal Revenue Service summonses. Special Agent John F. Olivero was the sole witness on behalf of Petitioners and his investigative file was examined by the district court *in camera*.

On March 9, 1976, the district court entered its Order and Memorandum Opinion denying judicial enforcement of the two Internal Revenue Service summonses, stating in its opinion that "[i]t is apparent from the evidence that Special Agent John F. Olivero in his investigative activities had focused upon the possible criminal activities of John Gattuso, and was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct by Mr. Gattuso." (App. A. p. 3a)

On May 7, 1976, the Petitioners herein filed their Notice of Appeal. The cause was briefed and set for argument before the United States Court of Appeals for the Seventh Circuit, which issued its ion on April 11, 1977.

(Footnote continued from preceding page.)
the beneficiary or any person designated in writing by the beneficiary has the exclusive power to direct or control the trustee in dealing with the title and the exclusive control of the management, operation, renting and selling of the trust property together with the exclusive right to the earnings, avails and proceeds of said property. Ill. Rev. Stat. Ch. 29, § 8.31 (1971).

The court of appeals defined its undertaking in terms of two questions. The first issue concerned the court's scope of review, while the second issue was characterized by the court as "whether the district court applied the proper legal test in making its finding of fact." (Res. App. B, p. 9a)

It is apparent from a reading of the opinion below that the court of appeals dealt unequivocally with the second question, resolving it in favor of the Respondents:

> "We agree with the respondents that the petitioners arguments ignore the good faith requirement of *Donaldson*. We further agree that the real issue before the court is whether the Internal Revenue Service may issue a summons solely in aid of a criminal investigation and still meet the standard of good faith as enunciated in *Donaldson*." (Res. App. B, p. 14a.)

Relying on *Donaldson* v. *United States*, 400 U. S. 519, and the standard for enforcing an Internal Revenue Service summons provided therein, the court of appeals stated:

> "We think that the Government oversimplifies the evidentiary posture of the case. Special Agent Olivero testified that he was pursuing a civil aspect, but the record establishes that the district court did not believe him." (Res. App. B, p. 15a.)

Finally, the court of appeals found no misapplication of the standard set forth in *Donaldson:*

> "We note that the district court expressly observed that the *bona fides* of the investigation was in issue. The Government attempts to use the district court's statement as an indication that it applied the wrong legal test. Our reading of the reported cases persuades us that the use of an administrative summons solely for criminal purposes is a quintessential example of bad faith. In view of our reading of the crucial language in *Donaldson*, see 400 U. S. at 536, we read the statement as a faithful reflection of that decision's alternative holding." (Res. App. B, p. 15a.)

On September 8, 1977, the Petitioners herein filed their Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. The Petition for Writ of Certiorari was granted on December 12, 1977.

ARGUMENT.

An Internal Revenue Service Summons May Not Be Issued Solely in Aid of a Criminal Investigation.

A. The Internal Revenue Service Is Not Authorized to Issue a Summons Solely in Aid of a Criminal Prosecution.

1. The essential question before the Court is whether the Internal Revenue Service is authorized, pursuant to Section 7602 of the Internal Revenue Code, to issue a summons solely in aid of a criminal investigation. Section 7602 states, in part:

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any Internal Revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any Internal Revenue tax, or collecting any such liability, the Secretary of his delegate is authorized . . .

The findings of the district court below and the decision of the Court of Appeals on review of those findings unequivocably establish that the summonses in question were issued solely in aid of a criminal investigation. (Res. App. A, pp. 2a-3a; Res. App. B, p. 15a) The findings and opinion below clearly state the fact that the purpose of the summonses issued herein were not to ascertain the correctness of any return, make a return where none had been made, to determine transferee liability, or, for that matter, to collect any such liability. Rather, the summonses issued herein were issued solely in aid of a criminal investigation and not for any of the purposes enumerated in Section 7602 of the Internal Revenue Code.

Petitioners seek to avoid this finding by asserting that the authority to issue summonses follows from the general duties of the Treasury to administer and enforce the Internal Revenue laws. They submit to the Court, in direct contradiction to the findings and opinion below, that the summonses at issue are in furtherance of those duties.

Additionally, the Petitioners assert that the Court has rejected past attempts to limit the power of the Internal Revenue Service to issue summonses. In support of this proposition, they cite the Court to its decisions in *Couch* v. *U. S.*, 409 U. S. 322; *Fisher* v. *U. S.*, 425 U. S. 391; and *U. S.* v. *Bisceglia*, 420 U. S. 141. A reading of these cases demonstrates that each is inapposite to the issue before the Court.

Petitioners first cite the Court to *Couch*. The basic issue before the Court in *Couch* was the applicability of the Fifth Amendment privilege against compulsory self-incrimination with respect to tax records that had remained in the continuous possession of the taxpayer's accountant.

In *Fisher*, the issue before the Court was almost identical to that in *Couch*. In *Fisher*, as in *Couch*, the taxpayer had delivered and transferred documents to his attorney and the Fifth Amendment privilege against compulsory self-incrimination was raised as a defense to the production of these transferred records. The Court in *Fisher* found, as it did in *Couch*, that the enforcement of the summons would not compel the taxpayer to be a witness against himself and, hence, found the Fifth Amendment privilege to be inapplicable.

The Petitioners herein cite with emphasis *U. S.* v. *Bisceglia*, 420 U. S. 141. The Court in *Bisceglia* did no more than approve the use of a 'John Doe' summons against Fourth and Fifth Amendment challenges. Additionally, *Bisceglia*, like *Couch* and *Fisher*, involved an investigation into civil and possible criminal liability. The facts herein, as determined by the courts below, are that no civil liability was being investigated by Special Agent

Olivero. The Court in *Bisceglia* noted the inherent limitations of the Internal Revenue Service with respect to its summons power:

> We recognize that the authority vested in tax collectors may be abused, as all power is subject to abuse . . .
>
> Substantial protection is afforded by the provision that an Internal Revenue Service summons can be enforced only by the courts. (Citations omitted) 420 U.S. at 146.

The Petitioners further cite the Court to *U. S.* v. *Kordel,* 397 U. S. 1. In *Kordel,* the subject matter of a civil forfeiture proceeding under the Federal Food, Drug, and Cosmetic Act became the basis of a later criminal prosecution. The criminal defendants sought to have their convictions set aside on the basis that their answers to interrogatories in the civil forfeiture proceeding violated their Fifth Amendment privilege against compulsory self-incrimination. In upholding the convictions the Court succinctly stated the issue:

> Overturning these convictions would be tantamount to the adoption of a rule that the Government's use of interrogatories directed against a corporate defendant in the ordinary course of a civil proceeding would always immunize the corporation's officers from subsequent criminal prosecution. 397 U.S. at 12-13.

The Petitioners' reliance on *Kordel* is misplaced. The Court in *Kordel* stated: "We do not deal here with a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution . . ." 397 U. S. at 11-12. In the instant case, the Government has brought a civil action solely to obtain evidence for a criminal prosecution. Neither *Kordel* nor any other case cited by the Petitioners support or approve this use of a summons. *Couch* and *Fisher* relate only to the Fifth Amendment privilege with respect to documents in the hand of third parties, while *Bisceglia* approves the use of a 'John Doe' summons with respect to third party records. The Respondents herein did not assert a Fifth Amendment privilege

with respect to the records which are the subject matter of the summonses, and no such privilege was found by the district court. Further, the summonses herein specifically named the taxpayer, precluding any reference to *Bisceglia.*

The Court in both *Reisman* v. *Caplin,* 375 U. S. 440, and *United States* v. *Powell,* 379 U. S. 48, provided the foundation upon which the decision below rests. In *Reisman,* the Court carefully outlined the procedural prerequisites for the enforcement of a summons and then stated:

> Furthermore, we hold that in any of these procedures before either the district judge or United States Commissioner, the witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, Boren v. Tucker, 9 Cr. 239 F2d. 767, 772-773, . . . *Id.* at 449.

Following *Reisman,* the Court in *Powell* held that the Internal Revenue Service could issue a summons without making a showing of probable cause to suspect fraud, unless the taxpayer raised a substantial question regarding the judicial enforcement of the summons. The standards articulated in *Powell* require the Commissioner to show that the investigation would be conducted pursuant to a legitimate purpose, that the inquiry was relevant to that purpose, and that the information sought was not within the Commissioner's possession already.

Nevertheless, the Court stated that, although the Commissioner need not meet a standard of probable cause to obtain enforcement, it was not the intent of the Court to "make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered." *Id.* at 55. The Court went on to state:

> At the hearing he 'may challenge the summons on any appropriate ground,' Reisman v. Caplin, 375 U. S. 440, at 449, 84 S. Ct. at 513. (Footnote omitted) Nor does our reading of the statutes mean that under no circumstances may the court inquire into the underlying reasons for the

> examination. It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. (Footnote omitted) Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. *Id.* at 58.

In *Donaldson* v. *United States*, 400 U. S. 517, the Court affirmed the lower court decision denying intervention to a taxpayer on the basis that the taxpayer had no proprietary interest in the records sought through the summons enforcement proceeding. The petitioners therein additionally argued that the summons should not be enforced because it potentially could result in a recommendation that criminal prosecution be instituted against him. In response to this argument, the Court analyzed the dictum in *Reisman* and stated:

> It is precisely the latter situation—where the sole object of the investigation is to gather data for criminal prosecution—that is the subject of the Reisman dictum. This is evident from the fact that the dictum itself embraces the citation of Boren v. Tucker, 239 F.2d 767, 772-773 (CA9 1956), an opinion in which, at the pages cited, the ninth circuit very carefully distinguished United States v. O'Connor, 118 F. Supp. 248 (Mass. 1953), a case where the taxpayer already was under indictment. The Reisman dictum is to be read in the light of its citation of Boren, and of Boren's own citation of O'Connor; when so read, the dictum comes into proper focus as applicable to the situation of a pending criminal charge or, at most, of an *investigation solely for criminal purposes*. (Emphasis supplied) *Id.* at 533.

The analysis by the Court of the dictum in *Reisman* clearly establishes that if the sole object of the investigation is to gather evidence for a criminal prosecution, the issuance of such summons is improper.

It was not the entry of the special agent into the investigation, nor the fact that this investigation was conducted solely by a

special agent, that rendered these summonses unenforceable. Rather, it was the issuance of these summonses by the special agent solely in aid of a criminal investigation that rendered them unenforceable.

The Petitioners assert that, prior to the Service's recommendation of a case to the Department of Justice, an investigation cannot be considered a preliminary criminal proceeding. It is precisely this mechanistic approach that allows and encourages the abuse of the summons' power. For the Court to adopt such an approach with respect to judicial enforcement of summonses in effect would destroy the very protection that such judicial review affords. Congress did not provide judicial review of such summonses merely to confer a judicial imprimatur on the administrative fiat of the Internal Revenue Service. Rather, the purpose of such review was to prevent the very abuses articulated by the Court in the dicta found in *Reisman*, *Powell* and *Donaldson* and by the courts below in the case at bar.

The Petitioners would assert that the distinction *Donaldson* drew was between a summons issued before the Internal Revenue Service recommended criminal prosecution to the Department of Justice and a summons issued following such recommendation. Such a characterization is simplistic and ignores the very standard of good faith enunciated by the Court in *Donaldson*.

It is the issuance of a summons solely in aid of a criminal investigation that renders a summons improper. The fact that a recommendation has been made to the Department of Justice does not terminate an investigation. Likewise, such a recommendation does not put the Government to an election of remedies, *i.e.* criminal v. civil liability. The distinctions posited by the Petitioners are not dispositive of the issue before the Court. The impropriety in the issuance of a summons after such recommendation lies not in the recommendation itself, but in the fact that after such recommendation, a summons is considered issued solely in aid of a criminal investigation.

The fact that a special agent has not initiated the administrative steps necessary to such recommendation does not establish *a priori* that all summonses issued by the special agent are enforceable, or, for that matter, that they are not issued solely in aid of a criminal investigation. It is clear that this distinction, which is urged upon the Court by the Petitioners, ignores the "good faith" requirement of *Donaldson*.

Petitioners refer to the investigation of the special agent herein as a "tax" investigation. Nothing in the decisions of either the district court or appellate court in this matter supports such a characterization. Nowhere is the investigation defined as a tax investigation. Rather, the opinions and findings below characterize the investigation as a criminal investigation. The district court's finding was clear:

> It is apparent from the evidence that Special Agent John F. Olivero in his investigative activities had focused upon the possible criminal activities of John Gattuso, and was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct by Mr. Gattuso. (Res. App. A, p. 3a.)

The court of appeals reviewed and affirmed this finding, stating:

> We are not persuaded that an improper legal test was applied and thus we cannot so simply evade the question. We hold that the clearly erroneous standard governs review of findings that an IRS summons has or has not issued in good faith. Assuming arguendo that the Supreme Court has not overruled or qualified Donaldson in its more recent adjudications, there is ample support in the record for the district court's finding of sole criminal purpose. The record establishes that Olivero testified to the existence of the civil purpose but that the district court, who observed the demeanor of the witnesses, discredited that testimony. We are not left with a firm and definite conviction that mistake has been made. (Res. App. B, p. 9a.)

B. The Findings of the District Court Were Not Clearly Erroneous and Therefore Were Correctly Sustained.

The Petitioners seek to avoid the adverse findings of fact which were sustained on appeal, namely, that the instant summonses were issued solely in aid of a criminal investigation. They attempt to do so by reciting the organizational manual of the Internal Revenue Service. The ultimate conclusion drawn by the Petitioners is that the authority of the Assistant Regional Commissioner with respect to both civil and criminal violations assures that these investigations will be utilized properly. This conclusion was not borne out in the instant case and is in complete disregard of the district court's findings. The fact that the Government may author manuals does not establish axiomatically that each agent and employee of the Government follows those manuals. During the cross-examination of Special Agent Olivero in the district court, the special agent admitted that he had not read in its entirety the *Internal Revenue Manual Handbook 28, Handbook for Special Agents in the Intelligence Division*, which is the very manual governing the conduct of such special agents in these investigations. (App. p. 42) Further, when questioned as to whether he followed the instructions and duties as outlined in the manual, the special agent admitted that he had not followed them and that he would ignore the manual in the event that the "home ground rules" were to the contrary. (App. pp. 42-44)

The Petitioners resorted to the sophistry of reciting the provisions of the organizational manual of the Internal Revenue Service in their brief on appeal to the Seventh Circuit. In response to such argument the court held:

> The Government insists that there was no evidence that Special Agent Olivero was not simultaneously pursuing a civil investigation. Reading the record evidence in this fashion, the Petitioners submit that it is clear that the special agent's investigation encompassed the purpose of determining the taxpayer's tax liability. Suggesting that the district court misfocused its inquiry, the Petitioners insist

that the only relevant inquiry is whether the investigation in aid of which the summons is issued is directed at least in part toward determining the liability of some person for an Internal Revenue tax. (Footnote omitted) The Government argues that once it is demonstrated that there is nothing unusual or sinister about the special agent focusing his attention on the criminal aspects of the case, the finding of sole criminal purpose must fall.

We think that the Government oversimplifies the evidentiary posture of the case. Special Agent Olivero testified that he was pursuing a civil aspect, but the record establishes that the district court did not believe him.

We note that the district court expressly observed the bona fides of the investigation was in issue. The Government attempts to use the district court's statement as an indication that it applied the wrong legal test. Our reading of the reported cases pursuades us that the use of an administrative summons solely for criminal purposes is a quintessential example of bad faith. In view of our reading of the crucial language in Donaldson, see 400 U. S. at 536, we read the statement as a faithful reflection of that decision's alternative holding. (Res. App. B, pp. 14a-15a.)

The statistics compiled by the Commissioner for 1976 should not be used as a basis for overturning the finding of fact below. The instant case concerns itself with two specific summonses. The fact that only one quarter of the full scale tax fraud investigations conducted during 1976 resulted in a recommendation for prosecution is irrelevant. That fact is of no aid in determining for what purpose any specific summons may issue.

Petitioners state that even in cases where no prosecution has been recommended substantial liabilities for tax deficiencies and penalties have been uncovered. It no doubt can be assumed that in the 2,037 cases recommended for prosecution substantial liabilities for tax deficiencies and penalties also were uncovered. Where the Government prosecutes for criminal tax violations, the claim for civil deficiencies and penalties are not waived and collection of such are sought as vigorously as in those cases where no recommendation for prosecution is made.

It is clear that the finding of the district court that the summonses were issued solely in aid of a criminal investigation was a finding of fact. It also is clear that the review of that finding is governed by the "clearly erroneous standard". As the court of appeals stated, "there is ample support in the record for the district court's finding of sole criminal purpose". (Res. App. B, p. 9a)

C. The Language and Legislative History of Section 7602 Confirm That Congress Never Has Authorized the Use of a An Internal Revenue Service Summons Solely in Aid of a Criminal Investigation.

The Petitioners exhaustively have traced the legislative history of Section 7602 and conclude that a summons may be used to investigate what may prove to be criminal conduct. Such analysis and the conclusion drawn therefrom avoids the issue, *i.e.*, that the instant summonses were issued solely in aid of a criminal investigation, not to investigate possible civil liabilities which ultimately might lead to criminal prosecution.

Section 7602 carefully delineates the purposes for which a summons may be issued: ascertaining the correctness of a return; making a return where none has been made, and determining transferee or fiduciary liability. The historical antecedents of the statute as cited by the Petitioners track almost precisely the wording now contained in Section 7602.

Section 3614(a) of the 1939 Code provided that the Commissioner could issue a summons for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none had been made. The Petitioners correctly trace the basis of Section 3614(a) to the Act of February 24, 1919, Section 1305, 40 Stat. 1057, 1124, which contained an identical provision.

The Petitioners also cite the Court to Section 3615(a)-(c) of the 1939 Code. That section provided a summons power to the collector under four specifically enumerated circumstances. A

summons could be issued to an individual notified under Section 3611 of the 1939 Code and who failed to comply with such notice. Further, it could be issued to any individual who failed to file a timely return, to any person who the collector determined may have filed an erroneous, false or fraudulent return or to any person who is required to file a return and who has refused to allow examination of his books. None of the purposes applies to the present case.

The investigating authority of the Internal Revenue Service, like that of other agencies, is not without limitations. The summons must be within the authority of the agency. *United States* v. *Morton Salt Co.*, 338 U. S. 632, 652, 653. While the broad investigative powers under Section 7602 have been endorsed by the courts, the summonses issued pursuant thereto must be in furtherance of and relevant to a legitimate purpose. *United States* v. *Powell*, 378 U. S. 48.

Neither the present statute nor the previous statutes authorize or permit the issuance of a summons solely in aid of a criminal investigation. The finding of the district court to such effect precludes any argument by the Petitioners that said summons were or could have been issued in aid of or pursuant to any of the provisions contained in Section 7602 or, for that matter, Sections 3614 and 3615 of the 1939 Code.

The legislative history of Section 7602 does not authorize or give the authority to the secretary or his delegate to issue a summons solely in aid of a criminal investigation. The investigation from which these summonses arose has been found to be a criminal investigation, not a tax investigation with possible criminal and civil liability.

The Petitioners' citation to the Court of Section 3654(a) of the 1939 Code is irrelevant. Analogizing that the general powers and duties of the secretary are coextensive with the summons power granted by Congress is clearly misleading. That Section 3654(a) of the 1939 Code provided for the collector to see to the faithful execution of and compliance with the laws and

regulations relating to the collection of taxes did not give unlimited scope to the summons authority of the Service. See *United States* v. *Bisceglia*, *Id.* at 152-161 (dissenting op.).

D. This Court's Decisions in Donaldson v. United States, 400 U. S. 517, and United States v. Powell, 379 U. S. 48, Support the Conclusions of Law Below.

The Court in *Powell* clearly stated the conditions precedent to the enforcement of a summons issued by the Internal Revenue Service. The Court stated that the investigation must be conducted pursuant to a legitimate purpose, that the inquiry be relevant to that purpose, that the information sought is not already within the Commissioner's possession and that the requisite administrative steps had been followed. *Id.* at 57. Nevertheless, the court, in clear recognition of the judicial functions implicit in any summons enforcement procedure, stated that the summons could be challenged on any appropriate ground.

The court's decision in *Donaldson* clearly indicates that when the sole object of an investigation is to obtain evidence for a criminal investigation, the issuance of the summons in furtherance of such is improper. The Court stated:

> The Reisman dictum is to be read in the light of its citation of Boren, and of Boren's own citation of O'Connor; when so read, the dictum comes into proper focus as applicable to the situation of a pending criminal charge or, at most, *of an investigation solely for criminal purposes. Id.* at 533. (Emphasis supplied).

The court concluded its decision in *Donaldson* by stating, "We hold that under Section 7602 an Internal Revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to the recommendation for criminal prosecution." *Id.* at 536. The Government's arguments herein consistently have ignored the good faith requirement of *Donaldson*.

The fact that, at the time Special Agent Olivero had issued the summonses to the Respondents herein, no recommendation

had been made by the Internal Revenue Service to the Department of Justice did not prevent Special Agent Olivero from issuing the summons solely in aid of a criminal investigation. The character of the investigation is not necessarily determined by this recommendation. It is clear that a special agent could delay in making such a recommendation or conduct, as he has herein, a criminal investigation where no recommendation has been made. It is the purpose and the nature of the investigation which determines the legitimacy of a summons issued in furtherance thereof. It is precisely this inquiry which determines the good faith or lack thereof in the issuance of the summons.

The Constitution provides for only one accusatory body and that is the Grand Jury. To allow the secretary or his delegate, the special agent, unlimited and unexamined summons authority to conduct an investigation, the sole purpose of which is to unearth evidence of criminal conduct, is tantamount to creating a Grand Jury with each and every special agent appointed. It is this type of abuse which the good faith requirement of *Donaldson*, if correctly applied, will avoid. As the court stated in *Abel* v. *United States*, 362 U. S. 217,

> The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts. The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States. *Id.* at 226.

E. The Summonses Herein Request Information Already Within the Possession of the Internal Revenue Service and Are Unenforceable for That Reason.

The Court in *Powell* articulated those elements which the Commissioner (Secretary) must establish for judicial enforcement of an Internal Revenue Service summons. The Court stated:

> He must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, *that the information sought is not already within the Commissioner's possession*, and that the administrative steps required by the Code have been followed—. . . *Id.* at 57-58 (Emphasis added.)

During the cross-examination of Special Agent Olivero in the district court below, the following exchange took place:

> "Q. Have you, on any occasion whatsoever, seen any or all of the documents which are now requested from the LaSalle National Bank?
> A. I can't recall." (App. p. 44.)

At another point in the cross-examination of Special Agent Olivero, the following was asked and answered:

> "Q. Have you checked the land title records?
> A. In our office, yes, sir. The identity of the land—
> THE COURT: The question is what title records did you check. Did you check over the County Building and check the County Land Title Records?
> THE WITNESS: I checked the land records for [35] purposes of identifying the real estate and then I checked the land trust files with the Internal Revenue Service."
>
> *By Mr. Cushner.*
>
> "Q. The Internal Revenue Service maintains land trust files?
> A. They maintain identity of land trust files submitted to them by the banks.
> Q. Do all the banks in the City of Chicago extend to the Internal Revenue Service the benefit of names of beneficiaries of land trusts?
> MR. CONTRAM: I object, your Honor.
> THE COURT: Objection sustained.
> Did you find anything in your search of the IRS land trust files relative to this case?
> THE WITNESS: Yes, sir. I found the name and identity of the land trust.
>
> *By Mr. Cushner.*
>
> Q. How was that provided to the Internal Revenue Service?
> A. I assume by the bank.

MR. CUSHNER: Your Honor, I'd like to go into how exactly the IRS received these records.

These records, under Illinois law, are confidential. Land trust documents provided that they should not be [36] disclosed and I think we should have a right to inquire how the IRS, if this agent knows, how the IRS acquired these records.

THE COURT: Tell me first how it's relevant?

MR. CUSHNER: I think it's possible that these agents may have obtained this information from friendly officers of the bank and the summons would be invalid and not be enforced by the Court if this is true.

THE COURT: I don't agree with that. Seeing something under any circumstances is far different from a summons requiring its production and official disclosure. I don't think that's even an appropriate area of inquiry.

MR. CUSHNER: I think Powell v. United States, the Supreme Court case, has established the fact that if the information is already within the hands of the Internal Revenue Service it's not proper inquiry for the summons. Okay, I'll go on." (App. pp. 45-46.)

The laws of the State of Illinois provide specifically for the creation of an Illinois land trust. Ill. Rev. Stat. Ch. 29, Section 8.31 (1971). The law generally provides that a trustee, in the instant case the LaSalle National Bank, pursuant to an Illinois land trust, becomes the bare holder of the legal and equitable title to real estate. The interest of the beneficiary consists of each and every element of ownership relating to real property, other than holding legal and equitable title thereto. The beneficiary, upon written direction, may cause title to be transferred; he is entitled absolutely to the avails and profits of the property, if any; is charged with the management and control of the premises, and is ultimately liable for any and all tort liability.

Land trust records consist of no more than the contract of trust between the beneficiary and the trustee providing that the trustee shall hold bare legal and equitable title to the property.

Land trust records also may contain whatever powers of direction may have been directed to the trustee, as well as whatever documents may be related to the purchase or sale of the property, as title is taken by or given by the land trust.

It is clear that Special Agent Olivero has seen or had access to some or all of these documents. The land trust documents themselves appear to be available to the Internal Revenue Service in their files. Information already has been provided to the Internal Revenue Service and hence to Special Agent Olivero by Revenue Agent Lieberman (App. pp. 39-40). Other information already is in the possession of the Internal Revenue Service through the return of the taxpayer herein and through the public records maintained by the County of Cook, State of Illinois.

It is clear that a full examination of Special Agent Olivero was prevented by the District Court below. (App. p. 46) Nevertheless, in view of the judicial recognition of the prevarication of Special Agent Olivero, it is questionable whether such examination would have elicited a full and complete disclosure of what information already was within the Secretary's possession.

CONCLUSION.

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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